SUPREME COURT, U. S.

FILED

SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1175

DELTA AIR LINES, INC.,

Petitioner,

v.

McDONNELL DOUGLAS CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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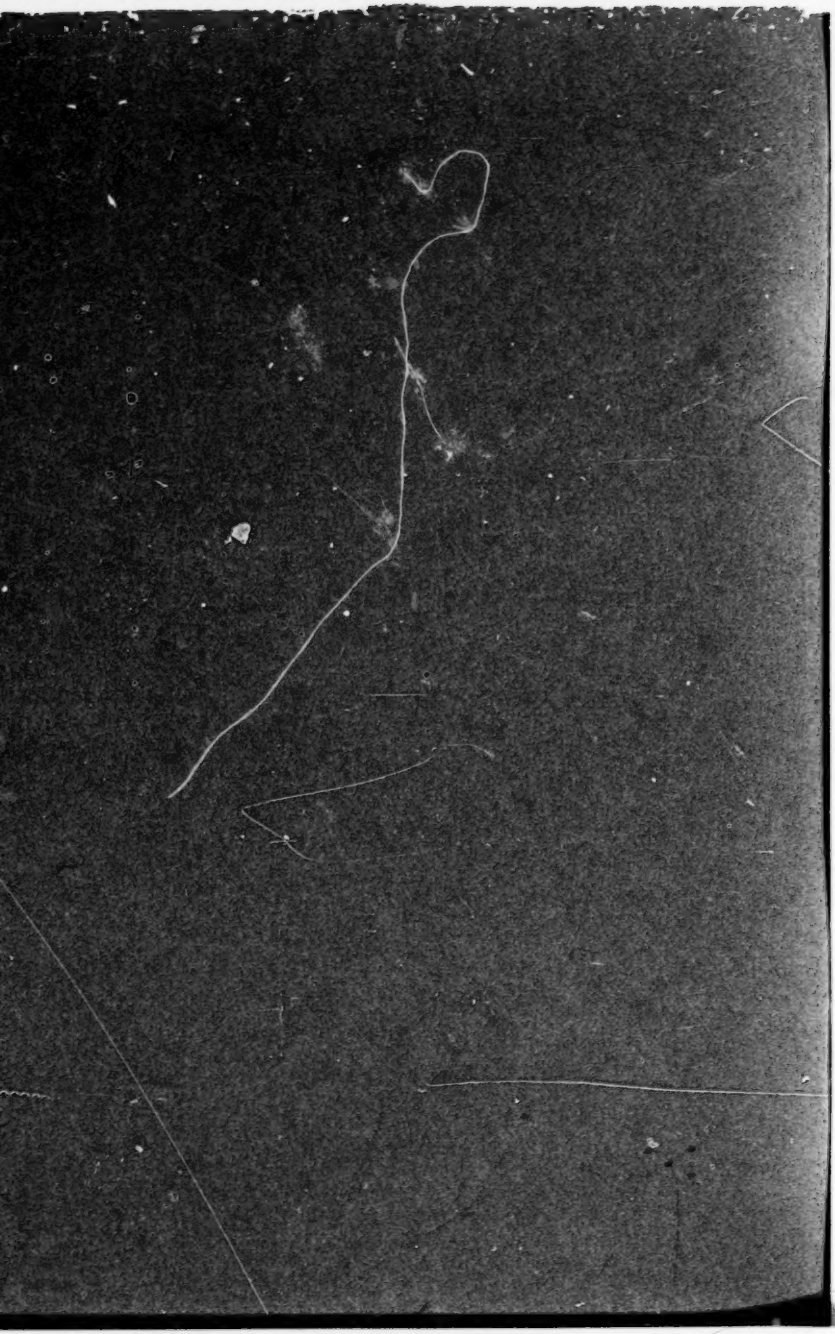

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No.

DELTA AIR LINES, INC.,

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McDONNELL DOUGLAS CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Delta Air Lines, Inc. (Delta), respectfully requests that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit to review the opinion and judgment entered in this case on October 31, 1974, rehearing of which was denied on December 17, 1974. The case involves important questions as to the effect of the violation of Federal Aviation Regulations by manufacturers of large commercial aircraft and calls for the application of this court's supervisory power to correct a grossly incorrect decision by the Fifth Circuit. The decision of the Fifth Circuit constitutes a clear failure to follow the applicable law and will result in the

the manufacture of aircraft, contrary to principles recognized by this Court and another Court of Appeals. Unless corrected by this Court, the decision could lead to a decrease in the safety standards of large aircraft manufacturers and a lower regard for the safety regulations of the Federal Aviation Administration (FAA).

OPINIONS BELOW

The opinion of the Court of Appeals, 503 F.2d 239 (5th Cir. 1974), is set out in the Appendix, as is the opinion of the United States District Court for the Northern District of Georgia, 350 F.Supp. 738 (USDC ND Ga. 1972).

JURISDICTION

The judgment of the Court of Appeals was entered on October 31, 1974, and a timely petition for rehearing was denied on December 17, 1974. This petition for certiorari is filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether an exculpatory clause which relieves a federally regulated manufacturer of aircraft from the consequences of violating a federal regulation requiring the safe manufacture of aircraft is void as being contrary to public policy.

STATUTORY PROVISIONS INVOLVED

1. Sections 601 and 603 of the Federal Aviation Act of 1958, 49 U.S.C. §§1421, 1423 are set out in the Appendix.

2. Section 21.165 of the Federal Aviation Regulations, 14 CFR §21.165, provides as follows:

> "21.165. *Responsibility of holder.*
>
> The holder of a production certificate shall
>
> (a) Maintain the quality control system with the data and procedures approved for the production certificate; and,
>
> (b) Determine that each aircraft submitted for airworthiness certification or approval conforms to the type design and is in a condition for safe operation."

provides as follows:

> "§1668. *Contracts contrary to policy of law*
> CERTAIN CONTRACTS UNLAWFUL. All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law."

STATEMENT OF THE CASE

This case arises out of the collapse of the nose gear of a new "stretched" DC-8 aircraft in January of 1969, some two weeks after it had been delivered by McDonnell Douglas Corporation (MDC) to Delta pursuant to a purchase agreement between the parties. (At the time the stretched DC-8 was the largest passenger-carrying aircraft in the world.) The collapse occurred when a regularly scheduled passenger flight was landing in Jacksonville, Florida. Fortunately, there were no injuries to passengers or the crew, but the nose and nose gear portions of the aircraft were substantially damaged.

After investigation Delta advised MDC that the collapse had resulted from the negligence of MDC and later requested MDC to reimburse it for damages sustained by Delta in the amount of approximately $203,000. The FAA also concluded that MDC had been at fault and that MDC had violated Section 21.165(b) of the Federal Aviation Regulations by failing to determine that the aircraft was in a condition for safe operation. (A copy of the FAA's letter in this regard is included in the appendix.)

MDC nevertheless refused to honor Delta's request for reimbursement and contended that it had no liability under the exculpatory clause of the purchase agreement. That clause provides that MDC's liability is limited to its express warranty obligations and that MDC is not responsible for any other

liabilities, even if occasioned from its own negligence.[1] MDC further denied that it had any obligation under the express warranty.

Subsequently, Delta initiated this action against MDC in the United States District Court for the Northern District of Georgia. Jurisdiction was based upon diversity of citizenship and amount in controversy under 28 U.S.C. §1332. MDC filed a motion for summary judgment based upon the exculpatory clause and the motion was overruled. The parties then agreed to a limited non-jury trial upon the issue of the effect of the exculpatory clause upon the various theories of recovery set out in Delta's complaint.

Following this trial the District Court entered a judgment dismissing Delta's claim insofar as it was based upon negligence and strict liability in tort on the basis that the exculpatory clause was broad enough to cover both of these theories and that the exculpatory clause did not violate public policy, despite the fact that it relieved MDC of the consequences of violating a federal aviation regulation; despite the California statute which specifically declares that any contract relieving a person from responsibility for a willful or *negligent* violation of

---

[1] The entire clause reads as follows: "(G) The warranty provided in this article and the obligations and liabilities of Seller thereunder are in lieu of and Buyer hereby waives all other warranties, guarantees or liabilities, express or implied arising by law or otherwise (including without limitation any obligation of Seller with respect to consequential damages) and whether or not occasioned by Seller's negligence and shall not be extended, altered or varied except by a written instrument signed by Seller and Buyer, provided that in the event the provision relieving Seller from liability for its negligence should for any reason be ineffective, the remainder of this paragraph (G) shall remain in full force and effect."

law is against public policy;[1] despite a clearly correct decision by the Ninth Circuit Court of Appeals reaching a contrary result, and despite a clearly correct decision by the Ninth Circuit Court of Appeals reaching a contrary result, and despite a decision of this Court recognizing that one of the main purposes of the rule preventing enforcement of release-from-negligence contracts is to discourage negligence by making the wrong-doer pay damagers. The District Court concluded, however, that there was substantial ground for difference of opinion and authorized an immediate appeal. Delta prosecuted an interlocutory appeal pursuant to 28 U.S.C. §1292(b). The Court of Appeals affirmed.

REASONS FOR GRANTING THE WRIT

1. The Courts Below Have Misconceived the Effect of Upholding the Exculpatory Clause Upon the Public Interest and in So Doing Have Undermined the Federal Regulation of Aircraft Safety.

MDC has contended, and the courts below have agreed, that the only thing involved in this case is whether two large corporations may agree to allocate the economic risks associated with defects in manufacturing even though the defects result from the manufacturer's negligence and even though the manufacturer violates federal safety regulations by its negligence. It also has been maintained by MDC that Delta could have paid more for the aircraft and secured the removal of the exculpatory clause. Although Delta's witnesses testified that it was *not* possible to negotiate the clause out of the contract, this is not the point raised by Delta's contention that the clause violates public policy and is void. *The point is that federal safety regulations are undermined by a private contract and that this is contrary to the public interest in attaining the highest possible degree of safety in the manufacture of aircraft which transport millions of passengers each year.*

---

[1] The parties had agreed that California law was applicable in determining the validity of the exculpatory clause.

In Section 601 of the Federal Aviation Act of 1958, 49 U.S.C. §1421, Congress has authorized the FAA Administrator to prescribe rules and regulations with respect to aircraft safety and in Section 603, 49 U.S.C. §1423, the Administrator is empowered to issue type and production certificates to manufacturers of aircraft under certain conditions and to issue airworthiness certificates for aircraft. (See Appendix.) Pursuant to this statutory authority the Administrator promulgated Section 21.165 of the Federal Aviation Regulations, 14 CFR §21.165, which requires the holder of a production certificate (such as MDC held for the "stretched" DC-8) to:

> "Determine that each aircraft submitted for airworthiness certification or approval conforms to the type design and *is in a condition for safe operation*." (emphasis added)

In its letter of April 24, 1969, the FAA stated that its investigation indicated that MDC had failed properly to assemble the aircraft and that MDC had violated §21.165(b) by failing to determine that the aircraft was in a condition for safe operation. (See Appendix.) Notwithstanding the fact that §1668 of the California Civil Code specifically declares as against public policy any contract which relieves a party of responsibility for a violation of law, the District Court and the Fifth Circuit refused to invalidate the exculpatory clause, which relieves MDC of responsibility for its own negligence even when it results in a violation of law.

The courts below failed to deal squarely with the issue raised by the California statute and the violation of the regulation, but instead relied upon the reasoning of a California court in an earlier case between Delta and MDC's predecessor, Douglas Aircraft Company, Inc., in which the issue had not been decided. In that case the court had said, "The upholding of the exculpatory clause will not adversely affect rights of future passengers" because "[t]hey are not parties to the contract and their rights would not be compromised." *Delta Air Lines, Inc. v. Douglas Aircraft Company, Inc.*, 238 Cal. App. 2d 95, 47 Cal. Reptr. 518 (1965). It is true that the rights of injured passengers would not be *directly* compromised, but

undoubtedly the passengers would prefer not to be injured in the first place. It is in order to *discourage* conduct which might cause such injuries that the courts have refused to uphold exculpatory clauses which affect the public interests and there could hardly be a matter in which the public has a greater interest than the safety of large commercial aircraft. The courts below lost sight of this point in concluding that the only issue was whether an allocation of risks should be upheld.

The principles involved were well-stated by the Ninth Circuit Court of Appeals in *Northwest Airlines, Inc. v. Alaska Airlines, Inc.*, 351 F.2d 253 (9th Cir. 1965), in which that court also demonstrated the views of this Court, expressed in *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955), as to the policy reasons for refusing to uphold exculpatory clauses such as the one involved here. Because of the pertinence of that case, which involved the public interest in safe aircraft operations, and the authority cited therein, it is quoted at length as follows:

> "It is, or course, ordinarily desirable that competent parties be protected in their rights to make and enforce agreements between themselves. *These rights are restricted by the transcendent rule that denies enforceability to a private contractual provision which would require an unlawful act or which, given effect, would gravely violate paramount requirements of public interest.* Especially significant here is the decision of our own court in Air Transport Associates v. United States, 221 F.2d 567 (9th Cir. 1955). There, the Government, the owner and operator of an Alaskan airport, had granted to an air carrier the right to employ the airport's facilities in exchange for valuable consideration and the execution by the carrier of an agreement undertaking to exculpate the Government for any loss arising from the carrier's operations. Following a nighttime crash of one of the carrier's planes, alleged to have resulted from the Government's negligence in parking a ground vehicle upon an unlighted runway, the carrier sued, under the Federal Tort Claims Act, to recover for the damage to its aircraft. *In defense, the Government invoked the exculpatory provision of the contract. We rejected the defense, holding that under the law of both Washington, where the contract was executed, and Alaska, where the contract was to be performed, the exculpa-*

tory provision was invalid. We held that its enforcement would be opposed to the policy interests of the general public. That decision rests upon the controlling fact that the airport was a public service. In looking to Washington law, we cited Griffiths v. Henry Broderick, Inc., 27 Wash. 2d 901, 182 P.2d 18, 175 A.L.R. 1 (1947), and Broderson v. Rainier Nat. Park Co., 187 Wash. 399, 60 P.2d 234 (1936), and we wrote, 221 F.2d at page 472,

> 'In both of those cases, while the Washington Supreme Court held valid exculpatory agreements, they recognized the general law concerning this type of agreement, and cited with approval the statement of that law found in the American Law Institute, Restatement of Contracts, Volume 2, Section 575(1) as follows:
>
> > ' "A bargain for exemption from liability for the consequences of a wilful breach of duty is illegal, *and a bargain for exemption from liability for the consequences of negligence is illegal if * * * (b) one of the parties is charged with a duty of public service, and the bargain relates to negligence in the performance of any part of its duty to the public, for which it has received or been promised compensation.*' " [emphasis added]
>
> "In Bisso [Bisso v. Inland Waterways Corp.], 349 U.S. at 91, 75 S.Ct. at 632, we see the Supreme Court's views in the language, '*The two main reasons for the creation and application of the rule [to prevent enforcement of release-from-negligence contracts] have been (1) to discourage negligence by making wrong-doers pay damages, * * **. The dangers of modern machines make it all the more necessary that negligence be discouraged.' Can it be sincerely believed that the public interest is better served by the discouraging of the negligence of tugboat operators than by the discouraging of negligence on the part of operators of public airports? We think not." [emphasis added]

Similarly, can it be believed that the public interest in discouraging the negligent manufacture of aircraft is less important than discouraging the negligence of airport op-

erators? Obviously, it is not and there is an overriding public interest that aircraft be manufactured safely as is evidenced by the detailed federal regulation of aircraft manufacturers. Clearly, public policy will not allow a manufacturer to insist upon a contract exculpating it from the consequences of violating such regulations. That this is true as a matter of federal law is demonstrated by the *Bisso* case. That it is true as a matter of general law is demonstrated by the Restatement of Contracts quoted in the *Northwest* case. There is no divergence from the federal or general law in California, as will be shown hereinafter. But the Courts below have failed to recognize the principles involved and this failure is quite important to the nation as whole because so many aircraft manufacturers are located in California and because of the effect of the decision upon the federal scheme of regulating aircraft safety.

2. The Courts Below Incorrectly Refused To Follow the Law of California Which, Consistent With the General Law, Requires a Holding that the Exculpatory Clause Is Against Public Policy and Void.

Both the District Court and the Court of Appeals incorrectly relied upon *Delta Air Lines, Inc. v. Douglas Aircraft Company, Inc., supra*, in holding that the exculpatory clause did not violate public policy, despite the fact that the question of violation of a federal regulation had not been decided by the *Delta v. Douglas* court. The Court of Appeals acknowledged that under *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), it was obliged to follow the law of California and that in *Delta v. Douglas* the court had not decided the question of whether the exculpatory clause would have been invalid if a federal regulation (or any other law) had been violated. Nevertheless, the court failed to take the next step required of it under the *Erie* doctrine of looking to other California cases which *had* ruled on the point. Instead of moving on to the applicable California cases the Court used the "bootstrap" reasoning that it had already concluded that the exculpatory clause was not invalid:

> "The total comments in the [Delta v. Douglas] opinion relating to this argument about Section 1668 leave no inference whatsoever as to how the court would have handled the argument had Douglas violated the regulations. See 47 Cal. Rptr. at 525. With the *Douglas* case providing no guidance, we feel our analysis of Delta's first point applies equally to this point, and Delta's argument fails."

Delta demonstrated, however, in its petition for rehearing, that the Court's analysis of the "first point" was incorrect and was not based upon California law, but upon an irrelevant principle of North Dakota law.[1] Moreover, nothing the court said could change the fact that the question of the effect of a violation of law was not ruled upon in *Delta v. Douglas* so that the court's clear duty was to apply the California cases which *had* decided the point. The California cases which *do* apply are discussed below.

In the case of *Hanna v. Lederman*, 36 Cal. Rptr. 150 (1963), the court had before it the exact legal issue presented in this case. There plaintiffs were tenants who were suing their landlord for damages resulting from a defective fire sprinkler system, which defect was alleged to be in violation of a city ordinance. The landlord maintained that the action was barred by an exculpatory provision in the lease which provided that "Lessee . . . hereby waives all claims against lessor for damages . . . from any cause arising at any time. . . ." (This is exactly the same as McDonnell Douglas' contention that Delta's claim is barred by the exculpatory clause.) After determining that the city ordinance was applicable, the Court held:

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[1] The court found, in regard to the so-called "first point," that Delta had confused "a negligence theory of action, under which violation of a law or a regulation may be evidence of negligence [citation omitted] with the liability that may be imposed by law." Delta pointed out in its petition for rehearing that the court had apparently misunderstood Delta's argument because the issue was not whether Delta could *prove negligence* by showing a violation of law (the negligence *per se* doctrine), but *whether the exculpatory clause was valid* if it relieved MDC of the consequences of violating a law.

> "Each lease contained an exculpatory provision which has been set forth hereinabove. The effect of that provision must be determined in light of section 1668 of the Civil Code.
>
> * * *
>
> "Since the claim for damages because of negligence embodied in the first cause of action . . . was predicated upon an alleged violation of [the city ordinance], *the exculpatory provision could not be a defense* to that cause of action if the evidence showed such violation to be a proximate cause of the tenant's loss." (36 Cal. Rptr. 25 154) [emphasis added]

Similarly, in this case Delta's negligence count alleges that MDC violated 14 C.F.R. §21.165 and that this violation was a proximate cause of Delta's damages. The cases are conceptually identical.

In a later case which is very similar to the *Hanna*, the California Fifth District Court of Appeals held in *Halliday v. Greene*, 53 Cal. Rptr. 267 (1966), that sublessees were covered by a safety order issued pursuant to law, and that an exculpatory clause in the lease was ineffective, saying:

> "However, the defect here constituted a violation of a safety order. If the safety order is applicable, the exculpatory clause is ineffective because Civil Code Section 1668 provides: [quotation omitted]
>
> "Public policy as expressed in Section 1668, prohibits an agreement to relieve one of the consequences of his violation of the law, and this is whether the violation be willful or negligent." (*Stonehocher v. Casano*, 154 Cal. App. 2d 732, 736, 316 P.2f 717.) (53 Cal. Rptr. at 272)

The principle was again reaffirmed in the case of *Buckner v. Azulai*, 59 Cal. Rptr. 806 (1967), where the court said "Any attempted waiver of such a duty so imposed by law is invalid." (59 Cal. Rptr. at 808)

By ignoring the cases cited above, which are the *only* cases cited to the Court on the validity of an exculpatory clause which relieves a party from the *civil* liability resulting from a violation of law, the Court violated its own conclusion as to the requirement of the *Erie* doctrine:

> "What may be more important in addressing the plaintiff's contention is that under Erie R.R. v. Tompkins, *supra*, we are bound to follow state law, whether or not we agree with the reasoning upon which it is based or the outcome which it dictates. This is the ultimate significance of the *Erie* decision. Delta has not cited us to any subsequent California decisions criticizing, distinguishing, or modifying the *Douglas* case. Therefore, *Douglas* remains the latest, most authoritative expression of California law applicable to the facts of this case. It is controlling for our purpose. See Ford Motor Co. v. Mathis, 322 F.2d 267, 269 (5th Cir. 1963)."

Delta did not need to cite any such cases, however, because even the Court of Appeals found that *Delta v. Douglas* did not deal with the question at issue. *Delta v. Douglas* was irrelevant on this point and it was not necessary that it be distinguished. Delta cited the California cases applicable to this question and neither the Court of Appeals nor MDC has or could distinguish them. Moreover, the cases cited by Delta were perfectly consistent with the leading California case of *Tunkl v. Regents of Univ. of Calif.*, 32 Cal. Rptr. 33, 391 P.2d 168 (1963). In *Tunkl* it had been held that exculpatory clauses affecting the public interest cannot be upheld and the court discussed a number of factors to be considered in determining if the public interest is involved,[1] but there was no violation of law involved in that case as there is here. Clearly, a violation of law or regulation (dealing with aircraft safety in this case) conclusively establishes a public interest, specifically recognized in §1668 of the California Civil Code, stronger than any of the individual factors mentioned in *Tunkl* for determining the public interest when a law or regulation is *not* violated.

CONCLUSION

In the Federal Aviation Act Congress established a pervasive scheme for regulating all aspects of safety in air transportation, including the manufacture of aircraft. In pur-

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[1] Delta pointed out in its briefs below that the *Delta v. Douglas* court had improperly distinguished *Tunkl* by concluding that public interest factors were not involved in the manufacture of aircraft.

suance of that scheme the FAA, *inter alia*, has issued regulations, which have the force of law, designed to insure the highest degree of safety possible in the manufacture of aircraft. That safety in the manufacture of aircraft is a matter of overriding federal public interest cannot be doubted. If an aircraft manufacturer may by contract relieve itself of any of the consequences which normally flow from the violation of these regulations then the federal regulatory scheme is seriously undermined. As this Court said in the *Bisso* case, *supra*, one of the two main reasons for the creation and application of the rule preventing the enforcement of release-from-negligence contracts is "to discourage negligence by making the wrongdoer pay damages * * *."

Consistent with the general law, California has declared that contracts which relieve a party of responsibility for a negligent or willful violation of law are void and its courts consistently have stricken down such clauses when raised as a defense in an action for damages.

If the decision of the Court of Appeals below is not reversed so as to comport with federal policy and California law, the public interest in the safe manufacture of aircraft will be thwarted, the federal law will be undermined and a serious error of decision will be allowed to stand. For these reasons, Delta respectfully prays that a writ of certiorari be issued to the Court of Appeals to review its decision in this case.

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STATUTORY PROVISIONS

Federal Aviation Act of 1958, Section 601, 49 U.S.C. §1421

§1421. Powers and duties of Administrator–Minimum standards; rules and regulations

(a) The Administrator is empowered and it shall be his duty to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time:

(1) Such minimum standards governing the design, materials, workmanship, construction, and performance of aircraft, aircraft engines, and propellers as may be required in the interest of safety;

(2) Such minimum standards governing appliances as may be required in the interest of safety;

(3) Reasonable rules and regulations and minimum standards governing, in the interest of safety, (A) the inspection, servicing, and overhaul of aircraft, aircraft engines, propellers, and appliances; (B) the equipment and facilities for such inspection, servicing, and overhaul; and (C) in the discretion of the Administrator, the periods for, and the manner in, which such inspection, servicing, and overhaul shall be made, including provision for examinations and reports by properly qualified private persons whose examinations or reports the Administrator may accept in lieu of those made by its officers and employees;

(4) Reasonable rules and regulations governing the reserve supply of aircraft, aircraft engines, propellers, appliances, and aircraft fuel and oil, required in the interest of safety, including the reserve supply of aircraft fuel and oil which shall be carried in flight;

(5) Reasonable rules and regulations governing, in the interest of safety, the maximum hours or periods of service of airmen, and other employees, of air carriers; and

(6) Such reasonable rules and regulations, or minimum standards, governing other practices, methods, and

procedure, as the Administrator may find necessary to provide adequately for national security and safety in air commerce.

Consideration of needs of service; classification of standards, rules, regulations, and certificates

(b) In prescribing standards, rules, and regulations, and in issuing certificates under this subchapter, the Administrator shall give full consideration to the duty resting upon air carriers to perform their services with the highest possible degree of safety in the public interest and to any differences between air transportation and other air commerce; and he shall make classifications of such standards, rules, regulations, and certificates appropriate to the differences between air transportation and other air commerce. The Administrator may authorize any aircraft, aircraft engine, propeller, or appliance, for which an aircraft certificate authorizing use thereof in air transportation has been issued, to be used in other air commerce without the issuance of a further certificate. The Administrator shall exercise and perform his powers and duties under this chapter in such manner as will best tend to reduce or eliminate the possibility of, or recurrence of, accidents in air transportation, but shall not deem himself required to give preference to either air transportation or other air commerce in the administration and enforcement of this subchapter.

Exemptions

(c) The Administrator from time to time may grant exemptions from the requirements of any rule or regulation prescribed under this subchapter if he finds that such action would be in the public interest. Pub.L. 85-726, Title VI, §601, Aug. 23, 1958, 72 Stat. 775.

Federal Aviation Act of 1958, Section 603, 49 U.S.C. §1423

§1423. Aircraft certificates–Authorization to issue; application; investigation; tests; issuance of type certificate

(a) (1) The Administrator is empowered to issue type

certificates for aircraft, aircraft engines, and propellers; to specify in regulations the appliances for which the issuance of type certificates is reasonably required in the interest of safety; and to issue such certificates for appliances so specified.

(2) Any interested person may file with the Administrator an application for a type certificate for an aircraft, aircraft engine, propeller, or appliance specified in regulations under paragraph (1) of this subsection. Upon receipt of an application, the Administrator shall make an investigation thereof and may hold hearings thereon. The Administrator shall make, or require the applicant to make, such tests during manufacture and upon completion as the Administrator deems reasonably necessary in the interest of safety, including flight tests and tests of raw materials or any part or appurtenance of such aircraft, aircraft engine, propeller, or appliance. If the Administrator finds that such aircraft, aircraft engine, propeller, or appliance is of proper design, material, specification, construction, and performance for safe operation, and meets the minimum standards, rules, and regulations prescribed by the Administrator, he shall issue a type certificate therefor. The Administrator may prescribe in any such certificate the duration thereof and such other terms, conditions, and limitations as are required in the interest of safety. The Administrator may record upon any certificate issued for aircraft, aircraft engines, or propellers, a numerical determination of all of the essential factors relative to the performance of the aircraft, aircraft engine, or propeller for which the certificate is issued.

Production certificates

(b) Upon application, and if it satisfactorily appears to the Administrator that duplicates of any aircraft, aircraft engine, propeller, or appliance for which a type certificate has been issued will conform to such certificate, the Administrator shall issue a production certificate authorizing the production of duplicates of such aircraft, aircraft engines, propellers, or appliances. The Administrator shall make such inspection and may require such tests of any aircraft, aircraft engine, propeller, or appliance manufactured under a production certificate as may be necessary to assure manufacture of each unit in

conformity with the type certificate or any amendment or modification thereof. The Administrator may prescribe in any such production certificate the duration thereof and such other terms, conditions, and limitations as are required in the interest of safety.

Airworthiness certificates

(c) The registered owner of any aircraft may file with the Administrator an application for an airworthiness certificate for such aircraft. If the Administrator finds that the aircraft conforms to the type certificate therefor, and, after inspection, that the aircraft is in condition for safe operation, he shall issue an airworthiness certificate. The Administrator may prescribe in such certificate the duration of such certificate, the type of service for which the aircraft may be used, and such other terms, conditions, and limitations, as are required in the interest of safety. Each such certificate shall be registered by the Administrator and shall set forth such information as the Administrator may deem advisable. The certificate number, or such other individual designation as may be required by the Administrator, shall be displayed upon each aircraft in accordance with regulations prescribed by the Administrator. Pub.L. 85-726, Title VI, §603, Aug. 23, 1958, 72 Stat. 776.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Delta Air Lines, Inc.,	)	
Plaintiff	)	
v.	)	**Civil Action No. 13768**
McDonnell Douglas Corporation,	)	
Defendant	)	

ORDER

Findings of Fact

1. This case involves the collapse of the nose landing gear assembly of a "stretched" or "super" DC-8 aircraft manufac-

tured by defendant McDonnell Douglas Corporation ("MDC") and operated by plaintiff Delta Air Lines, Inc. ("Delta"). Federal court jurisdiction is founded upon diversity of citizenship and an amount in controversy in excess of $10,000, exclusive of interest and costs. 28 U.S.C. § 1332.

2. At the July 10, 1972, nonjury trial the parties advised the Court that the evidence and discovery developed to date indicates that the cause of the nose gear collapse during the landing roll of the aircraft was an incorrectly installed component part of the nose landing gear assembly. Delta contends that the component part was installed incorrectly by MDC when MDC assembled the aircraft. MDC on the other hand contends that the component part was correctly installed during assembly and that the component part was removed and re-installed incorrectly during post-delivery servicing of the aircraft by Delta. In the alternative, MDC contends that if there was a "defect in workmanship" (*i.e.*, incorrect installation of a component part), Delta should and could have in the exercise of ordinary care detected such defect in workmanship, and that the alleged damages therefore arise from Delta's own negligence.

3. Delta's amended complaint seeks to impose liability on four theories: Count One alleges negligence; Count Two alleges breach of implied warranties of merchantability and fitness for a particular purpose; Count Three alleges breach of the express warranty; and Count Four alleges strict liability in tort.

4. As an additional and affirmative defense MDC asserts:

(a) the limitations of liability and exculpatory clause contained in the Warranty Article of the Purchase Agreement negotiated and agreed to by the parties bar Delta's claims based on negligence, breach of implied warranties and strict liability;

(b) MDC is not liable for breach of express warranty because the Warranty Article specifically provides that liability for breach of the express "workmanship" warranty is limited, among other things, to the replacement of the improperly installed part;

(c) Delta failed to follow the warranty claim procedures spelled out in the Warranty Article, which relieved MDC of liability with respect to the claim based on breach of express

warranty; and

(d) in any event MDC is not liable for the type of damages sought by Delta because such damages are specifically excluded by the limitations of liability and exculpatory clause contained in the Purchase Agreement Warranty Article.

5. MDC filed a motion for summary judgment (supported by evidence) based on the defenses outlined in the preceding paragraph. Delta submitted opposing affidavits and contended, among other things:

(a) as a matter of economic necessity Delta was required to purchase MDC's "stretched" DC-8 aircraft;

(b) the limitations of liability and exculpatory clause in the Purchase Agreement Warranty Article were forced upon Delta by MDC;

(c) Delta did not voluntarily agree to such provisions;

(d) Delta was unable to negotiate a deletion of such provisions from the Purchase Agreement;

(e) the Purchase Agreement is a contract of adhesion in this respect;

(f) the limitations of liability and exculpatory clause are unconscionable, violate public policy and are unenforceable; and

(g) the provisions of the Warranty Article therefore do not bar Delta's claims for relief.

6. The Court denied MDC's motion for summary judgment because there appeared to be material issues of fact in dispute. At the request of the parties, based upon a limited waiver of jury trial, the Court held a nonjury trial on July 10, 1972, to decide the validity of the "defense based upon the Warranty Article and exculpatory clause contained in the contract documents" (Limited Waiver of Jury Trial, filed June 15, 1972).

7. The Purchase Agreement in question was signed at Long Beach, California, on November 18, 1964, and originally related only to the so-called "short" DC-8 aircraft, or Series 51 DC-8 aircraft. On August 13, 1966, at Long Beach, California, the parties executed Amendment No. 5 to the Purchase Agreement. The amendment provided that additional DC-8

aircraft, of the Series 61 or "stretched" variety, would be delivered to Delta under the terms and provisions of the November 18, 1964, Purchase Agreement. The accident aircraft was one of the aircraft covered in Amendment No. 5.

8. Article 4 of the Purchase Agreement stated the aircraft would be manufactured and delivered in California, and Article 17 provided: "This agreement shall be construed and performance thereof shall be determined according to the laws of the State of California, U.S.A." The Purchase Agreement also contained clauses which limited the agreements between the parties to the exact written terms of the contract.

9. At the time of the accident in question, Delta was operating the aircraft under a lease agreement with McDonnell Douglas Finance Corporation, but the lease was contemplated by the parties and they agreed that the lease agreement would not abrogate or modify the provision of the Purchase Agreement.

10. The Warranty Article in the Purchase Agreement provided:

"12. WARRANTY.

"(A) Subject to the limitations and conditions hereinafter set forth, seller warrants that the aircraft, accessories, equipment and parts supplied hereunder which have been manufactured by seller, and by other manufacturers if made to detailed design and detailed specifications originated by seller, shall at the time of delivery by seller be free from:

(1) Defects in material and workmanship furnished by seller and used in the fabrication thereof;

(2) Defects arising from the selection of material or process of manufacture;

(3) Defects inherent in the design thereof in view of the state of the art as of the date of such design;

(4) Defects arising from failure to conform to the detailed specifications of this purchase agreement except as to such portions thereof, if any, as are expressly stated to be not guaranteed.

"(B) Defects in material and workmanship, defects arising from the selection of material or process of manufac-

ture and defects arising from failure to conform to the detailed specifications, must become apparent in the aircraft, accessory, equipment or part within one (1) year or two thousand (2,000) flying hours, whichever shall first expire, but not less than eight (8) months after delivery of said aircraft.

"The extent of seller's liability under this warranty as to defects in material or workmanship, defects arising from the selection of material or the process of manufacture, and defects arising from failure to conform to the detailed specifications, is limited to the repair at its expense of such defects in the aircraft or to the repair or replacement at its expense (with a similar item free from the defect in question) of any accessory, equipment or part which is defective in any of such respects.

"(C) The extent of seller's liablity under this warranty as to defects inherent in design is limited to the correction at its expense of all such defects becoming apparent in the aircraft, accessory, equipment or part purchased hereunder within one (1) year or two thousand (2,000) flying hours, whichever shall first expire, but not less than eight (8) months after delivery of said aircraft.

"(D) Seller shall make the foregoing repairs, replacements and corrections with reasonable care and dispatch in order that the aircraft, system, accessory, equipment or part involved may not be kept out of service longer than necessary. Disassembly of the aircraft to correct the defect, removal of the defective or faulty structure, system, accessory, equipment, or new part and installation of the corrected or new structure, system, accessory, equipment or new part and re-assembly of the aircraft shall be at buyer's expense, unless such work is performed by seller at its factory at Long Beach, California, or unless buyer offers to return the aircraft, accessory, equipment or part and buyer and seller thereafter mutually agree that buyer will perform the work and that seller will pay buyer in whole or in part for removal, installation and re-assembly of the aircraft. Cost of temporary or interim repairs, replacements and corrections accomplished by buyer, as well as any consequential cost related thereto, shall likewise be at buyer's expense, except when seller, in advance, approves in writing such temporary or interim repairs, replacements and corrections and the cost thereof, which cost seller may agree to pay in whole or in part.

"(E) Seller shall, as to each defect, be relieved of all obligations and liability under this warranty if:

(1) The aircraft is operated with any accessory, equipment or part not specifically approved by seller and not manufactured by seller or to seller's design and specification unless buyer furnishes reasonable evidence that such installation was not a cause of the defect; provided that this provision shall not apply to any accessory, equipment or part, the use of which does not affect the safety of the aircraft;

(2) The aircraft shall not have been operated or maintained in accordance with seller's instructions furnished under this agreement, unless buyer furnishes reasonable evidence that such operation or maintenance, as the case may be, was not a cause of the defect;

(3) The aircraft shall not have been operated under normal airline use, unless buyer furnishes reasonable evidence that such operation was not a cause of the defect;

(4) The aircraft shall not have been repaired, altered or modified without seller's approval or if the aircraft shall have been operated subsequent to its involvement in an accident, unless buyer furnishes reasonable evidence that such repair, alteration, modification, operation or accident was not a cause of the defect, provided, however, that this limitation insofar as it relates to repairs and accident shall not be applicable to routine repairs or replacements or minor accidents which normally occur in the operation of aircraft if such repairs or replacements are made within suitable material and according to standard practice and engineering;

(5) Buyer does not (i) report the defect in writing or by telegram to seller's warranty administrator at its factory in Long Beach, California, within sixty (60) days following such defect becoming apparent to buyer as provided in paragraphs (B) and (C) above, and (ii) return the defective or faulty aircraft, accessory, equipment or part to said factory (or, if return to seller's factory is not feasible and seller so agrees in advance in writing, which agreement shall not unreasonably be withheld, to buyer's base repair shop or other appropri-

ate facility in the United States) within sixty (60) days following the end of the applicable period of time specified in paragraphs (B) and (C) above, or within sixty (60) days following such defect becoming apparent, whichever is earlier, and further provided that if, for reasons beyond buyer's control, return of the items to seller's factory is not possible within said sixty (60) day period, and if buyer so notifies seller in writing and seller so agrees in writing, which agreement shall not unreasonably be withheld, the said sixty (60) day period will be waived, but buyer must return the item to seller's said factory if, as and when said return does become feasible. Buyer also must submit reasonable proof to seller, within sixty (60) days after the defect becomes apparent (except when such period is waived) that the defect is due to a matter embraced within the seller's warranty hereunder. Seller shall approve or disapprove buyer's substantiated warranty claim in writing within sixty (60) days of receipt thereof. All such transportation, including return to buyer of the repaired, replaced or corrected aircraft, accessory, equipment or part shall be at buyer's expense.

"With respect to matters made the subject of seller's approval under sub-paragraphs (1), (4) and seller's approval or disapproval of buyer's warranty claim under (5) of this paragraph (E), seller's approval or disapproval thereof shall be made in writing to buyer within sixty (60) days after buyer's written notice requesting approval is received by seller. In the event of disapproval, seller shall set forth the reasons therefor in its statement of disapproval. Seller's failure to deliver to buyer a written statement of approval or disapproval within such sixty (60) day period shall irrevocably and conclusively constitute approval by seller of the subject matter of the particular request involved.

"(F) Normal wear and tear and the need for regular overhauls shall not constitute a defect or failure under this warranty. Buyer acknowledges that some of the accessories, equipment and parts warranted hereunder have a normal life expectancy that is less than the time period specified under paragraph (B) and (C) above.

"(G) The warranty provided in this article and the obligations and liabilities of seller thereunder are in lieu of and

buyer hereby waives all other warranties, guarantees or liabilities, express or implied arising by law or otherwise (including without limitation any obligation of seller with respect to consequential damages) and whether or not occasioned by seller's negligence and shall not be extended, altered or varied except by a written instrument signed by seller and buyer; provided that in the event the provision relieving seller from liability for its negligence should for any reason be ineffective, the remainder of this paragraph (G) shall remain in full force and effect."

11. The aircraft Purchase Agreement incorporated the terms of a prior agreement, including the Warranty Clause, which were the subject of intensive negotiation. There was no substantial imbalance in the bargaining position of the parties and the Warranty Clause was not dictated by MDC on a "take it – or leave it" basis. Due to the California Court of Appeals decision in *Delta Air Lines, Inc. v. Douglas*, 230 Cal. App.2d 95 (Nov. 9, 1965), entered several months before the parties entered into the agreement in the instant case, Delta was aware that MDC would, under certain circumstances, agree to modification or elimination of the exculpatory clause, albeit for a price which Delta apparently did not wish to pay (see, 230 Cal. App.2d at 103, n.5).

Conclusions of Law

When ruling on substantive matters of law, federal courts must follow the laws of the State in which it sits [*Erie R.R. v. Tompkins*, 304 U.S. 64 (1938)] including its Conflicts of Laws rules [*Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941)]. The Georgia conflicts of law rule concerning the validity and interpretation of contracts made in another state provides the law of the state where the contract was made and performed will govern except when the result is contrary to the public policy of the State of Georgia. *Cox v. Adams*, 2 Ga. 158, 165 (1847); *Tillman v. Gibson*, 44 Ga. App. 440, 442, 161 S.E. 630, ____ (1931). The Georgia state courts would apply California law in this case not only because the contract was made and performed in California, but also because the parties specifically agreed in the contract that California law would

control.

12. The contract before the Court is in all material respects identical to the contract ruled on by the California Court of Appeals in *Delta v. Douglas, supra*. That case, which Delta unsuccessfully sought to have reviewed by the California Supreme Court, is the law of California so far as the matters at issue here are concerned. Accordingly, this Court must uphold the validity of the exculpatory clause contained in the Warranty Article of the contract before the Court.

Thus, Delta's causes of action sounding in "negligence" and "strict liability in tort" are DISMISSED. Delta's causes of action based on the validity of the Warranty Clause, which is hereby upheld as a matter of law, and recovery thereunder, are reserved for determination by jury trial pursuant to the limited waiver of jury trial referred to above.

SO ORDERED, this 30 day of October, 1972.

/s/CHARLES A. MOYE, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Delta Air Lines, Inc.,	)	
Plaintiff	)	
v.	)	**Civil Action No. 13768**
McDonnell Douglas Corporation,	)	
Defendant	)	

ORDER

On October 30, 1972, this Court dismissed Delta's claims based on negligence and strict liability in tort but did not rule on its claims based on implied and express warranty. The Court's order was based on its nonjury consideration of certain issues following a limited waiver by the parties of trial by jury.

Defendant, McDonnell Douglas, has moved the Court to amend that order so as to also dismiss the implied warranty claim and to exclude "consequential damages" from the express

warranty claim. In response, Delta contends that this additional relief sought by defendant is improper because it would force the court to consider issues on which Delta did not waive trial by jury. Accordingly, the Court is unwilling to go beyond an interpretation of the nonjury issues and consequently denies defendant's motion.

In an attempt to obtain the right to an immediate appeal of this Court's order of October 30, 1972, Delta has moved the Court to amend that order in one of the following ways:

(1) to include a determination "that there is no just reason for delay" and to direct the entry of a final judgment in accordance with Rule 54(b) of the Federal Rules of Civil Procedure or

(2) to permit an interlocutory appeal of a controlling question of law.

Although that order used the phrase "cause of action" with respect to Delta's claims which were dismissed, it probably would be more appropriate to say that Delta has a single cause of action against the defendant for the damage to its aircraft, and that its complaint sets forth several different legal theories supporting that cause of action. Consequently, the Court is doubtful that a finding pursuant to Rule 54(b) would be appropriate, but the Court is of the opinion that its order of October 30, 1972, involves a controlling question of law as to which there is substantial ground for a difference of opinion and that an immediate appeal from that order may materially advance the ultimate determination of the litigation [28 U.S.C. § 1292(b)]. Accordingly, the Court's order of October 30, 1972, is so amended.

This 22 day of November, 1972.

/s/CHARLES A. MOYE, JR.
United States District Judge

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED OCTOBER 31, 1974

Appeals from the United States District Court for the Northern District of Georgia.

Before BROWN, Chief Judge, and RONEY and GEE, Circuit Judges.

RONEY, Circuit Judge:

An aircraft purchased by Delta Air Lines, Inc. from McDonnell Douglas Corporation, the manufacturer, suffered damages when its nose gear collapsed during a landing in Jacksonville, Florida, because a component part was incorrectly installed. There were no personal injuries. Delta seeks to recover from McDonnell the expenses incurred in repair on four theories of liability: (1) negligence; (2) breach of implied warranties of merchantability and fitness for a particular purpose; (3) breach of express warranty; and, (4) strict liability in tort. The District Court dismissed the two counts sounding in negligence and strict liability on the ground that an exculpatory clause in the contract limited McDonnell's liability to contractual warranty provisions. Delta, in this interlocutory appeal, seeks review of the correctness of the Court's ruling in this regard. We affirm.

[1] By cross-appeal McDonnell seeks review of the District Court's refusal to dismiss the counts based on express and implied warranties. The District Court reserved decision as to these two counts pending trial. Accordingly, there is no decision on the attempted cross-appeal for us to review at this time. Assuming without deciding that the allowance of an interlocutory appeal was not improvident under these circumstances, we will review the validity and effect of the exculpatory clause only insofar as it presents a defense against the

counts for negligence and strict liability, the issues previously decided by the trial court.

The Purchase Agreement in question was signed at Long Beach, California, on November 18, 1964, and originally related only to the so-called "short" DC–8 aircraft, or Series 51 DC–8 aircraft. On August 13, 1966, at Long Beach, California, the parties executed Amendment No. 5 to the Purchase Agreement, which amendment provided that additional DC–8 aircraft, of the Series 61 or "stretched" variety, would be delivered to Delta under the terms and provisions of the November 18, 1964, Purchase Agreement. The accident aircraft was one of the aircraft covered by Amendment No. 5.

Article 4 of the Purchase Agreement stated the aircraft would be manufactured and delivered in California, and Article 17 provided: "This agreement shall be construed and performance thereof shall be determined according to the laws of the State of California, U.S.A." The Purchase Agreement also contained clauses which limited the agreements between the parties to the exact written terms of the contract.

At the time of the accident in question, Delta was operating the aircraft under a lease agreement with McDonnell Douglas Finance Corporation, but the lease was contemplated by the parties and they had agreed that the lease agreement would not abrogate or modify the provisions of the Purchase Agreement.

The Warranty Article in the Purchase Agreement, set forth in full in the margin,[1] contained the following exculpatory clause:

> (G) The warranty provided in this article and the obligations and liabilities of seller thereunder are in lieu of and

1. 12. WARRANTY.
(A) Subject to the limitations and conditions hereinafter set forth, seller warrants that the aircraft, accessories, equipment and parts supplied hereunder which have been manufactured by seller, and by other manufacturers if made to detailed design and detailed specifi-

buyer hereby waives all other warranties, guarantees or liabilities, express or implied arising by law or otherwise (including without limitation any obligation of seller with

cations originated by seller, shall at the time of delivery by seller be free from:

(1) Defects in material and workmanship furnished by seller and used in the fabrication thereof;

(2) Defects arising from the selection of material or process of manufacture;

(3) Defects inherent in the design thereof in view of the state of the art as of the date of such design;

(4) Defects arising from failure to conform to the detailed specifications of this purchase agreement except as to such portions thereof, if any, as are expressly stated to be not guaranteed.

(B) Defects in material and workmanship, defects arising from the selection of material or process of manufacture and defects arising from failure to conform to the detailed specifications, must become apparent in the aircraft, accessory, equipment or part within one (1) year or two thousand (2,000) flying hours, whichever shall first expire, but not less than eight (8) months after delivery of said aircraft.

The extent of seller's liability under this warranty as to defects in material or workmanship, defects arising from the selection of material or the process of manufacture, and defects arising from failure to conform to the detailed specifications, is limited to the repair at its expense of such defects in the aircraft or to the repair or replacement at its expense (with a similar item free from the defect in question) of any accessory, equipment or part which is defective in any of such respects.

(C) The extent of seller's liability under this warranty as to defects inherent in design is limited to the correction at its expense of all such defects becoming apparent in the aircraft, accessory, equipment or part purchased hereunder within one (1) year or two thousand (2,000) flying hours, whichever shall first expire, but not less than eight (8) months after delivery of said aircraft.

(D) Seller shall make the foregoing repairs, replacements and corrections with reasonable care and dispatch in order that the aircraft, system, accessory, equipment or part involved may not be kept out of service longer than necessary. Disassembly of the aircraft to correct the defect, removal of the defective or faulty structure, system, accessory, equipment, or new part and installation of the corrected or new structure, system, accessory, equipment or new part and re-assembly of the aircraft shall be at buyer's expense, unless such work is performed by seller at its factory at Long Beach, California, or unless buyer offers to return the aircraft, accessory, equipment or part and buyer and seller thereafter mutually agree that buyer will perform the work and that seller will pay buyer in whole or in part for removal, installation and re-assembly

respect to consequential damages) and whether or not occasioned by seller's negligence and shall not be extended, altered or varied except by a written instrument signed by

of the aircraft. Cost of temporary or interim repairs, replacements and corrections accomplished by buyer, as well as any consequential cost related thereto, shall likewise be at buyer's expense, except when seller, in advance, approves in writing such temporary or interim repairs, replacements and corrections and the cost thereof, which cost seller may agree to pay in whole or in part.

(E) Seller shall, as to each defect, be relieved of all obligations and liability under this warranty if:

(1) The aircraft is operated with any accessory, equipment or part not specifically approved by seller and not manufactured by seller or to seller's design and specification unless buyer furnishes reasonable evidence that such installation was not a cause of the defect; provided that this provision shall not apply to any accessory, equipment or part, the use of which does not affect the safety of the aircraft;

(2) The aircraft shall not have been operated or maintained in accordance with seller's instructions furnished under this agreement, unless buyer furnishes reasonable evidence that such operation or maintenance, as the case may be, was not a cause of the defect;

(3) The aircraft shall not have been operated under normal airline use, unless buyer furnishes reasonable evidence that such operation was not a cause of the defect;

(4) The aircraft shall have been repaired, altered or modified without seller's approval or if the aircraft shall have been operated subsequent to its involvement in an accident, unless buyer furnishes reasonable evidence that such repair, alteration, modification, operation or accident was not a cause of the defect, provided, however, that this limitation insofar as it relates to repairs and accident shall not be applicable to routine repairs or replacements or minor accidents which normally occur in the operation of aircraft if such repairs or replacements are made within suitable material and according to standard practice and engineering;

(5) Buyer does not (i) report the defect in writing or by telegram to seller's warranty administrator at its factory in Long Beach, California, within sixty (60) days following such defect becoming apparent to buyer as provided in paragraphs (B) and (C) above, and (ii) return the defective or faulty aircraft, accessory, equipment or part to said factory (or, if return to seller's factory is not feasible and seller so agrees in advance in writing, which agreement shall not unreasonably be withheld, to buyer's base repair shop or other appropriate facility in the United States) within sixty (60) days following the end of the applicable period of time specified in paragraphs (B) and (C) above, or within sixty (60) days following such defect becoming apparent, whichever is

seller and buyer; provided that in the event the provision relieving seller from liability for its negligence should for any reason be ineffective, the remainder of this paragraph (G) shall remain in full force and effect.

Amendment 5 incorporated the terms of the 1964 agreement, including the Warranty Clause, which terms were the subject of intensive negotiation. There was no substantial

earlier, and further provided that if, for reasons beyond buyer's control, return of the items to seller's factory is not possible within said sixty (60) day period, and if buyer so notifies seller in writing and seller so agrees in writing, which agreement shall not unreasonably be withheld, the said sixty (60) day period will be waived, but buyer must return the item to seller's said factory if, as and when said return does become feasible. Buyer also must submit reasonable proof to seller, within sixty (60) days after the defect becomes apparent (except when such period is waived) that the defect is due to a matter embraced within the seller's warranty hereunder. Seller shall approve or disapprove buyer's substantiated warranty claim in writing within sixty (60) days of receipt thereof. All such transportation, including return to buyer of the repaired, replaced or corrected aircraft, accessory, equipment or part shall be at buyer's expense.

With respect to matters made the subject of seller's approval under sub-paragraphs (1), (4) and seller's approval or disapproval of buyer's warranty claim under (5) of this paragraph (E), seller's approval or disapproval thereof shall be made in writing to buyer within sixty (60) days after buyer's written notice requesting approval is received by seller. In the event of disapproval, seller shall set forth the reasons therefor in its statement of disapproval. Seller's failure to deliver to buyer a written statement of approval or disapproval within such sixty (60) day period shall irrevocably and conclusively constitute approval by seller of the subject matter of the particular request involved.

(F) Normal wear and tear and the need for regular overhauls shall not constitute a defect or failure under this warranty. Buyer acknowledges that some of the accessories, equipment and parts warranted hereunder have a normal life expectancy that is less than the time period specified under paragraph (B) and (C) above.

(G) The warranty provided in this article and the obligations and liabilities of seller thereunder are in lieu of and buyer hereby waives all other warranties, guarantees or liabilities, express or implied arising by law or otherwise (including without limitation any obligation of seller with respect to consequential damages) and whether or not occasioned by seller's negligence and shall not be extended, altered or varied except by a written instrument signed by seller and buyer; provided that in the event the provision relieving seller from liability for its negligence should for any reason be ineffective, the remainder of this paragraph (G) shall remain in full force and effect.

imbalance in the bargaining positions of the parties and the Warranty Clause was not dictated by McDonnell on a "take it-or leave it" basis. Due to the California Court of Appeal decision in Delta Air Lines, Inc. v. Douglas Aircraft Co., Inc., 238 Cal.App.2d 95, 47 Cal.Rptr. 518 (1965), rendered several months before the parties entered into the agreement in the instant case, Delta was aware that McDonnell would, under certain circumstances, agree to modification or elimination of the exculpatory clause, albeit for a price which Delta apparently did not wish to pay. *See* 238 Cal.App.2d at 103 n. 5, 47 Cal.Rptr. at 523 n. 5.

[2–4] The parties agree with the proposition that in this diversity case, we must follow state law,[2] including state conflict of law rules,[3] and that the Georgia conflicts rule provides that the law of the state where a contract is made and performed will govern the validity and interpretation of the contract except when the result is contrary to the public policy of the State of Georgia.[4] The Georgia state courts would apply California law in this case not only because the contract was made and performed in California, but also because the parties specifically agreed in the contract that California law would control.[5]

The chief point of disagreement between the parties that we are called upon to settle concerns what a California court would do with this case. This disagreement centers around the precedent established by Delta Air Lines, Inc. v. Douglas Aircraft Co., Inc., 238 Cal.App.2d 95, 47 Cal.Rptr. 518 (1965), in the light of an earlier California Supreme Court case, Tunkl v. Regents of University of California, 60 Cal.2d 92, 32 Cal.

2. Erie R. R. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

3. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941).

4. Cox v. Adams, 2 Ga. 158, 165 (1847); Goodman v. Nadler, 113 Ga.App. 493, 148 S.E.2d 480, 483 (1966).

5. *See* Barzda v. Quality Courts Motel, Inc., 386 F.2d 417 (5th Cir. 1967).

Rptr. 33, 383 P.2d 441 (1963), and a California statute dealing with exculpatory clauses, Cal.Civ.Code § 1668 (West 1972).

Delta Air Lines, Inc. v. Douglas Aircraft Co., Inc., *supra*, involved the validity, as between the same airline and the same manufacturer as the case at bar, of virtually identical warranty provisions in connection with an airplane accident also caused by a malfunctioning nose landing gear. The intermediate California Court of Appeal upheld the exculpatory clause in the contract as precluding a negligence suit brought by the airline against the manufacturer.

Faced with this strong indication of how a California court would decide this case, Delta makes essentially five arguments against that result, which we find unpersuasive. We address the arguments *seriatim* as presented in Delta's brief.

[5, 6] First, Delta contends that the exculpatory clause is in clear violation of the public policy of California as specifically set out in the statutes of that state because it would relieve McDonnell of responsibility for the violation of § 21.165 of the Federal Aviation Administration (FAA) regulations requiring it to determine that the aircraft was in a condition for safe operation. California Civil Code § 1668 makes it against the policy of the law for a contract to exempt anyone from responsibility for violation of the law.[6] Delta asserts that by delivering the plane with the nose gear part incorrectly installed, McDonnell violated the FAA regulation found at 14 C.F.R. § 21.165 (1974), which provides in effect that an airplane manufacturer must determine that any airplane proposed for certification is in a condition for safe operation.[7]

6. Cal.Civ.Code § 1668 provides:
   All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.

7. Section 21.165 reads:
   The holder of a production certificate shall—
   (a) Maintain the quality control system in conformity with the data and procedures approved for the production certificate; and

Delta, however, confuses a negligence theory of action, under which violation of a law or a regulation may be evidence of negligence, *see* Steel v. Downs, 438 F.2d 310, 316 (8th Cir. 1971), with the liability that may be imposed by law. McDonnell is still answerable to the FAA and third parties for any responsibility established by the regulation, and any statutory right of action that might be given to Delta by FAA regulations has not been abrogated. But none of these causes of action are involved in an action based on common law negligence. We are unable to agree that the contract between two industrial giants fixing the dollar responsibility for McDonnell's alleged negligence would be void under California law, any more than would be an insurance contract which might be written for the same purpose.

Second, and along the same lines as the first argument, Delta contends that this case is distinguishable from Delta Air Lines, Inc. v. Douglas Aircraft Co., Inc., because in that case the court did not consider the issue raised here with respect to the violation of § 21.165. The *Douglas* court, however, did reject an argument similar to the one asserted first by Delta, by finding that Douglas had not violated the regulations there in question. Delta argues that the clear inference from the case is that had such a violation been proved, the California Court would have held the exculpatory clause void under Section 1668. Since this case is at the pleading stage, Delta contends that it ought to be permitted to prove what it did not prove in the state case.

Although Delta is correct in contending that *Douglas* did not consider the issue raised here as to a FAA regulation violation, it is incorrect in asserting that the California Court conceded that if a violation of such a regulation had been shown the exculpatory clause would have been invalid under

(b) Determine that each completed product submitted for airworthiness certification or approval conforms to the type design and is in a condition for safe operation.

California law. The total comments in the opinion relating to this argument about Section 1668 leave no inference whatsoever as to how the court would have handled the argument had Douglas violated the regulations. *See* 47 Cal.Rptr. at 525. With the *Douglas* case providing no guidance, we feel our analysis of Delta's first point applies equally to this point, and Delta's argument fails.

Third, Delta argues that even if Delta Air Lines, Inc. v. Douglas Aircraft Co., Inc. were not distinguishable, the court in that case did not correctly apply the law of California as set out in the leading cases of that state. Instead, Delta asserts, that court misinterpreted and incorrectly applied the law, while the duty of the court below in this case was to apply the law of California correctly, and not just to follow the *Douglas* case. And since that case was not a correct interpretation of the law, the District Court was bound to follow the law set out in the statutes and other decisions of California.

In this argument, Delta stresses the case of Tunkl v. Regents of University of California, 60 Cal.2d 92, 32 Cal.Rptr. 33, 383 P.2d 441 (1963). In *Tunkl,* the Supreme Court of California held that release from liability for future negligence imposed as a condition for admission to a charitable research hospital was invalid on the ground that the agreement affected the public interest. The court reviewed a variety of exculpatory clause cases and concluded that an exculpatory provision can only be valid if it does not affect the "public interest." The *Douglas* court dealt specifically with *Tunkl* and its analysis of California law, and concluded in a very thorough discussion, that the contract between the airline and the manufacturer was not clothed with the kind of public interest that surfaced in a contract between a patient and a hospital. Based on the reasoning in the *Douglas* opinion, we are convinced that California law was correctly applied there. What may be more important in addressing the plaintiff's contention is that under Erie R. R. v. Tompkins, *supra,* we are bound to follow state law, whether or not we agree with the

reasoning upon which it is based or the outcome which it dictates. This is the ultimate significance of the *Erie* decision. Delta has not cited us to any subsequent California decisions criticizing, distinguishing, or modifying the *Douglas* case. Therefore, *Douglas* remains the latest, most authoritative expression of California law applicable to the facts of this case. It is controlling for our purposes. *See* Ford Motor Co. v. Mathis, 322 F.2d 267, 269 (5th Cir. 1963).

Fourth, Delta contends that even if the court below correctly determined that the exculpatory clause is valid under the law of California, the clause violates the public policy of Georgia and should not be enforceable as a defense to Delta's complaint by a federal court sitting in Georgia.

To support this argument, Delta cites only a Georgia statute similar to Cal.Civ.Code § 1668.[8] The argument fails to carry the point for the same reasons that made the position untenable as a matter of California public policy.

[7] Finally, as to the dismissal of the strict liability count only, Delta makes this argument: The count based upon strict liability in tort is not barred by the exculpatory clause (even if valid) because one of the basic reasons for the development of the theory of strict liability is to transcend technical bases for denying liability where the product involved is unreasonably dangerous to the public. Contractual attempts to restrict liability are therefore immaterial in strict liability cases.

Although McDonnell argues in response to this that strict liability does not apply to factual circumstances such as these, we do not have to rule on this argument because we agree with McDonnell's contention that the exculpatory clause is broad enough to include the concept of strict liability in tort.

8. Ga.Code Ann. § 20-504 provides:

> A contract which is against the policy of the law cannot be enforced; such are contracts tending to corrupt legislation or the judiciary, contracts in general restraint of trade, contracts to evade or oppose the revenue laws of another country, wagering contracts, contracts of maintenance or champerty. . . .

Although the California Court of Appeal did not expressly mention strict liability in the earlier Delta Air Lines, Inc. v. Douglas Aircraft Co., Inc. case, the holding by that Court is broad enough to encompass strict liability. In reaching its decision, the California Court cited and discussed Greenman v. Yuba Power Products, Inc., 59 Cal.2d 57, 27 Cal.Rptr. 697, 377 P.2d 897 (1963), the landmark California case dealing with the concept of strict liability in tort, and expressly held: "Even though disclaimer clauses are to be strictly construed, still we find that this clause covers not only contractual warranty liability but also tort liability." 238 Cal.App.2d at 101, 47 Cal.Rptr. at 522. The doctrine of strict liability is a tort concept, and the statement by the California Court that the exculpatory clause is broad enough to encompass "tort liability" as well as other forms of liability clearly indicates that strict tort liability has been disclaimed. Any other conclusion would emasculate the basic purpose of the Warranty Article and exclupatory clause.

Finding no persuasive arguments that militate against following this remarkably similar California case, we affirm the dismissal of the two counts in negligence and strict liability as being barred by the exculpatory clause in the contract under the authority of Delta Air Lines, Inc. v. Douglas Aircraft Co., Inc., *supra.*

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
OCTOBER TERM, 1973

No. 73-1799

D. C. Docket No. CA 13768

DELTA AIR LINES, INC.,
Plaintiff-Appellant-Cross Appellee,

versus

McDONNELL DOUGLAS CORPORATION,
Defendant-Appellee-Cross Appellant.

Appeals from the United States District Court for the Northern District of Georgia

Before BROWN, Chief Judge, and RONEY and GEE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiff-appellant-cross appellee pay to defendant-appellee-cross appellant, the costs on appeal to be taxed by the Clerk of this Court.

October 31, 1974

Issued as Mandate: December 26, 1974

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 73-1799

DELTA AIR LINES, INC.,
Plaintiff-Appellant-Cross Apellee,

versus

McDONNELL DOUGLAS CORPORATION,
Defendant-Appellee-Cross Appellant.

Appeal from the United States District Court for the Northern District of Georgia

ON PETITION FOR REHEARING
(December 17, 1974)

Before BROWN, Chief Judge, RONEY and GEE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

2815 East Spring Street
Long Beach, California 90806

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

April 24, 1969

McDonnell Douglas Corporation
Douglas Aircraft Company
3855 Lakewood Boulevard
Long Beach, California 90801

Attention: Mr. W. F. Stryker, Director Reliability and Quality Assurance

Gentlemen:

On January 31, 1969, Delta Air Lines DC-8-61 aircraft, Registration No. N1302L, Serial No. 46029, experienced collapse of its nose landing gear while landing at Jacksonville, Florida. Subsequent investigation indicated that taper bolts, P/N 4716811-501, had been installed by Douglas Aircraft Company in the upper cross tube assembly only, and not through the cross tube bearings, P/N 4771383-501A. McDonnell Douglas Corporation, Douglas Aircraft Company, took immediate corrective action by reinspecting all production aircraft before delivery to the airlines and, in addition, revised DC-8 and DC-9 Assembly Outlines. The DC-8 Assembly Outline 310M7100-210, Edition 24, and DC-9 Assembly Outline 474-4325-2, Edition 19, were issued with the addition of applicable reference drawings, and a special attention note to the drawing view showing proper installation of the taper bolts through bearings.

The circumstances indicate that McDonnell Douglas Corporation, Douglas Aircraft Company, holder of Production Certificate No. 27, were in violation of Federal Aviation Regulations 21.165 (b) in that they failed to determine that each completed

product submitted for airworthiness certification conforms to the type design and is in a condition for safe operation.

After our subsequent discussions with you concerning this discrepancy, and the action taken by your company to preclude any future occurrence of this nature, we have concluded that no further enforcement action is necessary as a result of this incident. In lieu thereof, we are issuing this official reprimand which will be made a matter of record. You may consider this matter closed.

Sincerely,

/s/ JOHN B. BARNARD
JOHN B. BARNARD
Supervising Inspector
WE-AEDO-48

RECEIVED BY DIRECT MAIL.
CERTIFIED # 425534

Note: Incident previously reported by FAA Miami ltr dtd 2-4-69.